(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

LIFE SYSTEMS, INC.,

Petitioner,

v.

LOWRY CHIROPRACTIC LIFE CENTERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of Virginia has held that Va. Code 8.01-329(B)(i), which allows a plaintiff to rely on substitute service to a defendant's last known address without first mandating either reasonable or due diligence to verify the relied upon last known address, is constitutional. This holding raises the following substantial federal question that warrants direct review by this Court:

Whether a plaintiff proceeding under Va. Code 8.01-329(B)(i), can satisfy federal due process requirements by using substitute service of process mailed to a nonresident defendant's "last known address" without first having shown that any efforts have been made to locate defendant.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Life Systems, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner Life Systems, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case. In plain contravention of the requirements of the Constitution of the United States, the state supreme court allowed a Virginia corporation to obtain a default judgment against an non-resident corporation by relying on a Virginia substitute service statute that allows a serving party to provide the Secretary of the Commonwealth defendant's last known address without first requiring any efforts be made to verify the information provided. A fundamental requirement of due process of law in any proceeding is notice reasonably calculated under all the circumstances to apprize the interested parties of the pendency of the action and afford them an opportunity to present their objections, as mandated by the Fourteenth Amendment to the United States Constitution and the decisional law of this Court. Therefore, the Virginia Supreme Court's decision involves issues of *federal* importance.

OPINIONS BELOW

The opinions of the Supreme Court of Virginia (App. A and D) are not reported. The order of the Circuit Court of Virginia for the City of Richmond (App. B) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Virginia was entered on February 22, 2002. The Supreme Court of Virginia entered an order denying a timely petition for rehearing on April 19, 2002. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

The key provision is Va. Code 8.01-329(B), which states in pertinent part:

> When service is to be made on the Secretary, the party or his agent or attorney seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

STATEMENT OF THE CASE

I. The Underlying Litigation

This case involves Lowry Chiropractic Life Centers' ("Lowry") civil claims against Life Systems, Inc. ("Life Systems") arising from Life Systems' alleged failure to provide Lowry with a working computer system. Lowry is a Virginia corporation operating within the City of Richmond. Life Systems is a foreign corporation, registered in Florida.

In the summer of 1997, Lowry contacted Life Systems to purchase a computer hardware and software package system. In December, 1997, Life Systems shipped the hardware and software to Lowry.

On March 23, 2000, Lowry commenced its action by filing a Motion for Judgment in Virginia seeking damages of $150,000, plus interest and costs, alleging that the computer system did not work in accordance with Life Systems' representations, warranties, and covenants.

On or about March 28, 2000, Lowry attempted to effectuate service on Life Systems pursuant to Virginia Code § 8.01-329(B)(i) via service upon the Secretary of the Commonwealth. In its Affidavit for Service of Process on the Secretary of the Commonwealth, Lowry provided the following "last known address" for Life Systems: 760 Florida Central Parkway, Suite 200, Longwood, Florida, 32750-6344. However, effective January 12, 2000, Life Systems had changed its principal address and mailing address to 755 W. State Road 84, Suite F, Longwood, Florida, 32750-5136, as recorded with the Florida Secretary of State.

As a result, Life Systems did not receive notice that Lowry commenced this action and was prevented from filing a timely responsive pleading. Lowry's Motion for Default Judgment was granted in the amount of $145,141.78, plus interest, in a final order dated June 8, 2000. Life Systems did not learn of the default judgment until December 2000.

II. The Appeal of Default Judgment

In the Virginia Circuit Court Life Systems sought to vacate the default judgment on the basis that it was denied due process of law. In Life System's Memorandum to Set Aside Default Judgment, filed in the Virginia Circuit Court, petitioner repeatedly raised the issue of due process. On page 3 of petitioner's Memorandum the first argument is entitled "I. The default judgment against LSI is void because the court lacked personal jurisdiction over the defendant." Also on page 3, Petitioner's argument I. A. is entitled "Lowery failed to serve LSI with proper notice of its motion for judgment, thereby denying LSI due process of Law." On page 5, petitioner argues:

> Although VA Code 8.01-329(B)(i) does not specifically require a plaintiff to affirm that he exercised "due diligence" to locate the correct address of a non-resident corporation, it is to be presumed that a plaintiff is charged with a reasonable duty to ascertain and verify the accuracy of any sworn statement in the litigation process. Without such a duty, the long-arm statute, contrary to its intention would allow a plaintiff to profit from its own negligence and thereby eviscerate the concept of due process.

After oral argument the Circuit Court judge overruled Life System's motion to set aside the default judgment, stating, in pertinent part:

> I'm going to . . . deny the motion to vacate for these reasons. Number one, I think that the statute does not require that there be an investigation. I think the last known address means the last known to the plaintiff. And, obviously, if we had a last known address that was maybe 30 years ago, that might be a problem. But, maybe not." App. C.

However, the trial court made no finding as to the length of time between Lowry's last correspondence with Life Systems and Lowry's filing of its motion for judgment. The record is silent as to the date of Lowry's last communication with Life Systems. The record indicates that the sale took place in 1997 and Lowry filed its motion for judgment in 2000.

The Circuit Court entered an order denying Life System's motion on September 6, 2001. App. B.

III. Proceedings in the Virginia Supreme Court

Life Systems timely filed its petition for appeal with the Virginia Supreme Court in which it set out the following assignments of error:

> I. The trial court erred in denying Life Systems' motion to set aside the default judgment when it did not require Lowry to exercise due diligence, or at a minimum a reasonable inquiry, pursuant to Section 8.01-271, when Lowry failed to

> ascertain the last known address of Life Systems, a nonresident corporation, pursuant to Section 8.01-329(B)(i).
>
> II. The trial court erred in refusing to void the default judgment, in favor of Lowry and against Life Systems, for lack of proper notice violates life systems' due process under the 14th Amendment to the United States Constitution.

On February 22, 2002 the Virginia Supreme Court entered an order opining "there is no reversible error in the judgment complained of." App. A. On April 19, 2002 the Virginia Supreme Court denied Life Systems timely petition for rehearing. App. D.

REASONS FOR GRANTING THE WRIT

Ensuring due process is unquestionably a matter of absolute importance. As this Court has stated:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951), Frankfurter, J. concurring (footnote omitted). It is manifest that a party obliged to give notice must adopt a method "reasonably calculated" to reach the intended recipient. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). By upholding a statute

for substitute service on nonresident corporations that fails to mandate the serving party to first attempt to verify the defendant's last known address prior to service of process, the Virginia Supreme Court's decision eviscerates this basic tenet of American jurisprudence.

The Virginia Supreme Court's decision is unconstitutional, not because in fact it upheld a statute that failed to provide *actual notice* to a defendant; this Court has recently held that due process does not require *actual notice*. *Dusenbery v. United States*, 122 S. Ct. 694 (2002) Rather, the Virginia Supreme Court's decision is unconstitutional because under the circumstances, by permitting use of substitute service of process mailed to a defendant's last known address without first mandating the serving party to exercise at least reasonable diligence to verify this relied upon address, Section 8.01-329(B)(i) is not reasonably calculated to reach those who could easily be informed by other means at hand.

This Court's review of the Supreme Court of Virginia's decision is warranted because it "decided an important question of federal law in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c); it "decided an important federal question in a way that conflicts with the decision of another state court of last resort," Sup. Ct. R. 10(b); and it "decided an important question of federal law that has not been, but should be, settled by this Court . . ." Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the constitutional restraints on the ability of States to impose jurisdiction on nonresidents. Not only is the decision of the court below in conflict with precedents of this Court and the decisions of at least two other state courts of last resort but it also presents potential problems regarding its enforcement outside of Virginia.

The divergent state holdings on the due process requirements of serving nonresident defendants have created a situation in which those states requiring diligence in ascertaining the nonresident defendant's address refuse to give full faith and credit to judgments obtained in states with no such requirement.

I. Review is warranted in this case because The Virginia Supreme Court's decision to uphold a substitute service statute that fails to mandate a serving party attempt to verify a defendant's last known address denies Life Systems its due process rights under the Fourteenth Amendment to the United States Constitution.

This Court has recognized the test set out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) as the appropriate analytical framework for inquiries involving reasonable notice as a due process requirement: "Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice." *Dusenbery v. United States*, 122 S. Ct. 694, 699-700 (2002). (Citing *New York City v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953); *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956); *Schroeder v. City of New York*, 371 U.S. 208, 210 (1962); *Robinson v. Hanrahan*, 409 U.S. 38, 39 (1972) (per curiam); *Greene v. Lindsey*, 456 U.S. 444, 448 (1982); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484 (1988)). The Virginia Supreme Court's decision fails to pass the *Mullane* test.

Addressing the third *Mullane* factor proves most instructive. According to *Mullane* we must address the practical difficulties that face a plaintiff who must serve notice on a nonresident corporation. *Mullane* at 314. By doing so we can determine whether the substitute service permitted by section 8.01-329(B)(i) is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity" to participate in the action. *Id.*

"Under all the circumstances" embodies the premise that a plaintiff must act diligently and take such steps in attempting to give a defendant such notice of the proceeding as is reasonably practicable. In certain circumstances, this will require assuring actual notice; in others, it may be enough to *seriously attempt* to determine the defendant's present location and to mail notice to that address. In all circumstances some form of diligence must be exercised in order to verify a defendant's current location. A statute such as Section 8.01-329(B) that fails to mandate any form of inquiry into a nonresident defendant's current location cannot be "reasonably calculated to reach those who could easily be informed by other means at hand" *Mullane*, 339 U.S. at 314 and is therefore contrary to this Court's precedent and unconstitutional.

In the case at hand, Lowry failed to exercise *any form* of diligence to verify the accuracy of Life Systems' last known address that Lowry provided to the Secretary of the Commonwealth for substitute service. According to the Virginia Circuit Court and Supreme Court's interpretation of section 8.01-329(B) no form of diligence is required to verify the last known address submitted for constructive service on nonresident defendants. Therefore, the Virginia

Supreme Court has interpreted Section 8.01-329(B) such that there is no requirement that one using this substitute service statute make any effort to determine whether the address to which the notice is mailed is current.

A plethora of problems can and have arisen from the Virginia Supreme Court's interpretation of Section 8.01-329(B). In the abstract, under such a construction, a plaintiff could sue an out of state defendant and rely on substitute service to an address that is years if not decades old. Considered in light of the practicalities of the situation, no persuasive case can be made to justify a state court not imposing at least a duty of reasonable diligence on a plaintiff relying on substitute service to first attempt to verify whether the last known address submitted is current.

In the case at hand, Lowry was not dealing with a large number of defendants but rather one single corporation, Life Systems. Moreover, a mere requirement of reasonable diligence would have prompted Lowry to make negligible efforts to verify Life Systems' last known address. Negligible efforts such as a brief call to the Florida Corporations Commission or a short search on any internet search engine using the term "Life Systems, Inc." would have informed Lowry of Life Systems current address. Such negligible efforts would have satisfied Lowry's duty of reasonable diligence and preserved Life Systems' due process right to notice of the pending lawsuit.

The Virginia Supreme Court's decision opens the door to a federalism catastrophe. The court below has essentially ruled that a Virginia resident may obtain a default judgment against a nonresident without first truly attempting to inform the nonresident defendant of the pending action.

The decisions of this Court make it clear that the requirement of reasonable notice must be regarded as part of the constitutional due process limitations on the jurisdiction of a state or federal court. This Court has historically maintained the notion that the due process clause provides defendants a right to be free from judgments of courts lacking authority over them. *See Pennoyer v. Neff*, 95 U.S. 715, 733 (1877) ("[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.") The decision of the Supreme Court of Virginia eviscerates this basic tenet of American jurisprudence.

II. Review is warranted in this case because The Virginia Supreme Court's decision to uphold a substitute service statute that fails to mandate a serving party attempt to verify a defendant's last known address conflicts with relevant decisions of other state courts of last resort.

The divergent state holdings on the due process requirements of serving nonresident defendants have created a situation in which those states requiring diligence in ascertaining the nonresident defendant's address refuse to give full faith and credit to judgments obtained in states with no such requirement. The Maryland Court of Appeals has recently denied granting full faith and credit to a Virginia decision involving Section 8.01-329(B). *See Miserandino v. Resort Properties, Inc.*, 691 A.2d 208 (Md. Ct. App.) (1997). Moreover, *in Carlson v. Bos*, 740 P.2d 129 (1987) the Utah Supreme Court held that a Utah statute involving substitute service that failed to expressly prescribe reasonable diligence to verify the defendant's last known address was unconstitutional unless it was read in conjunction with another Utah statute that prescribed reasonable diligence to verify all information contained in affidavits submitted to the courts. In addition, cases in a number of states

have held that statutes involving mailing process to a "last known address" must necessarily call for reasonable effort by the serving party to verify the defendant's last known address. In *Medeiros v Kaye*, 331 A.2d 351 (1974) the Connecticut Superior Court held:

> It is clear 'that statutes of the nature of the one before us are not ineffective to confer jurisdiction over the person of a nonresident defendant if compliance with their terms will bring about a reasonable probability that he will receive actual notice of the bringing of the action and if he will be afforded a reasonable opportunity to appear and defend. . . . [i]t is reasonable probability of notice, not actual notice, which is the test.' *Hartley v. Vitiello*, 154 A. 257, 258. It appears that notice should be sent to a place or address where it is probable that the notice will be received by the addressee. *Id.* at 352-353.

See also Halliman v. Stiles, 464 S.W.2d 573 (1971)

> The requirement in our statute that the notice be sent to the nonresident defendant at his 'last known address' has been said to be indefinite. (*internal citations omitted*) Unless this is interpreted to mean that diligence is necessarily required in ascertaining such address, the statute does not prescribe a method of service reasonably calculated to give actual notice and, therefore, does not comport with the constitutional standards set out in *Wuchter v. Pizzutti, supra*; *Id.* at 577;

and *Mitchell v. Second Judicial Dist. Court*, 418 P.2d 994, 997 (1966)

> When notice is sent to the 'best address available to the plaintiff,' the affidavit should state the source of that address. A mere conclusory statement will not suffice. A sworn statement as to source will serve to establish the good faith of the plaintiff to give actual notice and will, to some extent, diminish the possibility of fraud. *Id.* at 997.

The divergent state interpretations of the due process requirements for ascertaining the "last known address" for nonresident defendants create in important question, which needs to be resolved.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE VIRGINIA SUPREME COURT DATED FEBRUARY 22, 2002

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 22nd *day of* February, 2002.

Record No. 012700
Circuit Court No. LL 94

Life Systems, Inc.,

Appellant,

against

Lowry Chiropractic Life Centers, Inc.,

Appellee.

From the Circuit Court of the City of Richmond

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk
By: s/ Jennifer G. Earl
Deputy Clerk

APPENDIX B — ORDER OF THE CIRCUIT COURT OF THE CITY OF RICHMOND DATED AND ENTERED SEPTEMBER 6, 2001

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building
September 6, 2000

At Law
Case No. LL 594

LOWRY CHIROPRACTIC LIFE CENTERS, INC.,
A Virginia Corporation,

Plaintiff,

v.

LIFE SYSTEMS, INC.,
a foreign corporation not registered in Virginia,

Defendant.

ORDER

Plaintiff Lowry Chiropractic Life Centers, Inc. ("Lowry") and defendant Life Systems, Inc. ("LSI") came before the Court on this day, upon defendant's Motion to Set Aside the Default Judgment and upon the opposing memoranda of the parties; and the matter was presented to the Court upon the evidence and for their argument;

Appendix B

Upon consideration, the defendant's Motion is hereby DENIED. The judgment in the principal amount of $145,141.78, plus interest at the judgment rate of 9% per annum from January 1, 2000, plus costs is UPHELD.

ENTER: September 6, 2001

s/ T. J. Markow
T. J. Markow, Judge

APPENDIX C — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS DATED SEPTEMBER 6, 2001 pp. 27-28

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Case No. LL-594

LOWRY CHIROPRACTIC LIFE CENTERS, INC.,

Plaintiff,

v.

LIFE SYSTEMS,

Defendant.

HEARING ON MOTION TO SET ASIDE DEFAULT JUDGMENT

Before: Judge T. J. Markow

September 6, 2001

Richmond, Virginia

* * *

[27]

* * *

THE COURT: All right, sir. I'm going to overrule the motion and deny the motion to vacate for these reasons.

Number one, I think that the statute does not require that there be an investigation. I think the last known address means the last known to the plaintiff. And, obviously, if we had a last known address that was maybe 30 years ago, that might be a problem. But, maybe not. That would at least be a question. But, here there is no question.

And on the reasonable inquiry basis, I believe, as Mr. Marrs has represented to the Court, that he corresponded with these people at this address a short time prior to the time that the suit was filed and they did not get the letters coming back. Nothing came back to you that you sent the letter to that address?

MR. MARRS: Nothing came back to us.

THE COURT: All right. Motion is overruled. Do you have a sketch?

MR. MARRS: I do, Your Honor, if I could show it to Mr. —

[28] THE COURT: I note your objection, sir.

MR. GORDON: Likewise, for the record and the reporter, please note my objection on the record. Thank you, Your Honor.

* * * *

APPENDIX D — OPINION OF THE VIRGINIA SUPREME COURT DENYING PETITION FOR REHEARING DATED APRIL 19, 2002

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Friday *the* 19th *day of* April, 2002.

Record No. 012700
Circuit Court No. LL 594

Life Systems, Inc.,

Appellant,

against

Lowry Chiropractic Life Centers, Inc.,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 22nd day of February, 2002 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s/ [illegible]
Clerk

No. 02-103

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

In The Supreme Court of the United States

LIFE SYSTEMS, INC.,
Petitioner,

v.

LOWRY CHIROPRACTIC LIFE CENTERS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Supreme Court may reach the due process issue raised by appellant where appellant, failed to present any competent evidence in the trial court in support of its motion to set aside the default judgment?

II. Whether a plaintiff proceeding under Va. Code § 8.01-329(B)(i) can satisfy federal due process requirements by using substitute service of process mailed to a nonresident defendant's "last known address", where such address was reasonably probable to put the defendant on notice of the initiation of the suit?

III. Where Life Systems' admissions in its own filings demonstrate that the address used by Lowry for "long arm" service was still current at the time of service, may Life Systems escape the judgment simply because it defaulted without adequate or proven excuse?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption contains the names of all the parties to the proceeding. Respondent Lowry Chiropractic Life Centers, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

Respondent Lowry Chiropractic Life Systems, Inc. ("Lowry") offers this Counterstatement of the Case to apprise the Court of certain significant facts that were omitted from Petitioner's Statement of the Case.

Particularly, Life Systems, Inc. ("Life Systems") fails to mention that because it had transacted business within the Commonwealth (at Lowry's offices in Richmond and at other locations), it was required to have a Virginia registered agent (*see* Va. Code § 13.1-812), but had failed to establish one. Accordingly, Lowry was forced to serve Life Systems under the olong arm" statute, Va. Code § 8.01-329, by having the Richmond Sheriff's office deliver a copy of the Motion for Judgment to Virginia's Secretary of the Commonwealth along with the requisite affidavit.

At the time Lowry had its Motion for Judgment served through the Secretary of the Commonwealth, it provided the standard Affidavit for Service of Process on the Secretary of the Commonwealth, fully completed, and listing as the last known address of Life Systems the location of 760 Florida Central Parkway, Suite 200, Longwood, FL 32750-6344.

Life Systems concedes that this address was accurate throughout its pre-suit dealings with Lowry, but has alleged that it had moved from that address only a few months before Lowry pursued service there. Importantly, though, Life Systems presented no competent evidence to confirm that allegation.

To the contrary, in its own filings, Life Systems established that the address used by Lowry to effect service was still in use for at least one officer of Life Systems. See Life Systems' Memorandum in Support of Defendant's Motion to Set Aside Default Judgment, Exhibit 3, Affidavit of James D. Carlburg, and its attached Exhibit 1, 2000 Uniform

Business Report (Lodging pp. 30-33). In this document, upon which Life Systems sought to rely despite its own unwillingness or inability to present competent evidence to authenticate and admit it, the address used by Lowry is still shown as an active address for James D. Carlburg, listed in the section for officers and directors of Life Systems.

Moreover, Lowry established at the September 6 hearing that it had provided ample pre-suit notice to Life Systems of its intent to bring suit, yet Life Systems provided Lowry with no notice at all of Life Systems' intent to move or supposedly having moved. (*See generally*, transcript of hearing September 6, 2000 (Lodging p. 1). As a result, the address used by Lowry was indeed the "last known" address, being the address used on any number of items of correspondence sent to Lowry by Life Systems prior to suit filing, without any corrections or notices of changes ever being provided.

Life Systems wholly failed to produce any competent evidence that Lowry did know or could have known that Life Systems had moved - if, in fact, Life Systems had moved, a fact never proved by Life Systems with competent evidence.

ARGUMENT

I. REVIEW IS NOT WARRANTED BECAUSE LIFE SYSTEMS FAILED TO PRESENT COMPETENT EVIDENCE IN SUPPORT OF ITS MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

Life Systems failed to present admissible evidence in support of its contention that it had moved its Florida offices and therefore failed to receive notice of Lowry's suit and Motion for Default Judgment. The only proffers from Life Systems were affidavits and Florida Uniform Business Reports attached to its Motion to Set Aside Default Judgment (Lodging pp. 30-33, p.34). At the hearing on Life Systems' motion, Life Systems failed to call a single witness to authenticate the documents. Lowry preserved its objection to the admission of such inadmissible hearsay evidence in the trial court proceedings and by addressing the trial court's error in Lowry's opposition to Life Systems' Petition for Appeal to the Supreme Court of Virginia. This Court should not compound the error of the trial court by considering Life Systems' due process claim. To issue an opinion based on Life Systems' bald assertions would be tantamount to issuing an advisory opinion on the constitutionality of Virginia's long-arm statute, something this Court must decline. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985) (stating that "[t]wo of the cardinal rules governing the federal courts" are (1) "never to anticipate a question of constitutional law in advance of the necessity of deciding it," and (2) "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (citations and internal quotations omitted)).

II. REVIEW IS NOT WARRANTED BECAUSE THE TRIAL COURT PROPERLY FOUND THAT UNDER THE FACTS OF THIS CASE, COMPLIANCE WITH VA. CODE § 8.01-329(B)(i) WAS REASONABLY CALCULATED TO APPRISE LIFE SYSTEMS OF THE SUIT AGAINST IT AND TO AFFORD IT THE OPPORTUNITY TO PARTICIPATE IN THE ACTION.

Life Systems is a foreign corporation, but is not registered to do business in the Commonwealth of Virginia. Furthermore, Life Systems never appointed a statutory agent within the Commonwealth. As a result, Lowry was entitled to serve process in accordance with Va. Code § 8.01-329A, which states:

> "notice may be served on any agent of such person in the county or city in this Commonwealth in which that agent resides or on the Secretary of the Commonwealth . . . who, for this purpose, shall be deemed the statutory agent of such person."

When service is made on the Secretary, the party or his agent or attorney seeking service must file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. Va. Code § 8.01-329(B). In either case, such affidavit shall set forth the last known address of the person to be served. Va. Code § 8.01-329(B).

Lowry properly filed an affidavit with the Court stating that Life Systems was a foreign corporation and including its last known address. After attempting to acquire

Life Systems' address through the Virginia State Corporation Commission, Lowry used the address that had been listed on all correspondence between the parties since 1997. Such correspondence included notice that Lowry intended to file suit. None of the correspondence was returned to sender as undeliverable.

Life Systems cites no authority for its proposition that the Supreme Court of Virginia has interpreted Va. Code § 8.01-329(B) "such that there is no requirement that one using this substitute service statute make *any effort* to determine whether the address to which the notice is mailed is current." (Petition at 10) (emphasis added). Rather, Life Systems rests its contention on the fact that the Supreme Court of Virginia did not hear Life Systems' appeal of the trial court's decision that Lowry was not required *under the circumstances of this case* to contact the Florida Corporation Commission to check Life Systems' address. Life Systems, however, misstates the trial court's ruling. The court did not merely find that the statute in question does not require an investigation. Rather, the court first found that the proper standard was whether the method of service was "reasonably calculated to give the person notice." (Lodging p. 8). The court overruled Life Systems' motion in light of the fact that Lowry corresponded with Life Systems at the address used "a short time prior to the time that the suit was filed and they did not get the letters coming back." (Lodging p. 27).

Under similar circumstances, in Virginia Lime Co. v. Craigsville Distributing Co., 670 F.2d 1366 (4th Cir. 1982), the Fourth Circuit examined the constitutionality of Va. Code § 8.01-329(B) and held that service was proper and due process requirements were satisfied where plaintiff mailed notice to defendant's last known address even though the defendant claimed that the address was not its last known address and service had been refused by its agent for that

reason. The court found that the "last known address" requirement was "satisfied when process is sent to the address at which the parties regularly corresponded by mail, and the party serving process reasonably could expect that process would reach the defendant at that address." Id. at 1368. The court further found that "[t]his construction of the statutory phrase 'last known address' comports with the constitutional standard of notice set forth in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)." Id.

As noted above, the trial court made a determination that the method of service under the circumstances of this case, namely use of an address used repeatedly in correspondence, was reasonably calculated to put Life Systems on notice. Contrary to Life Systems' assertion, therefore, the Supreme Court of Virginia's denial of Life Systems' Petition for Appeal was not tantamount to interpreting the long-arm statute to allow the plaintiff to fail to make any effort to use the correct address for defendant's last known address.

Furthermore, Life Systems fails to present a true "split" among the states regarding the state holdings on the due process requirements of serving nonresident defendants. The case of Miserandino v. Resort Properties, Inc., 691 A.2d 208 (Md. Ct. App.) (1997) cited by Life Systems, did not deal with a reasonable inquiry requirement, but instead, examined whether a form of mailing that utilized a return receipt should be required. The trial court's ruling in the present case is consistent with the remaining cases cited by Life Systems in that each case is concerned with whether the method of service is reasonably probable to afford the nonresident defendant notice of the pending action. Life Systems' due process rights were not violated by Lowry's method of service and therefore review of this case is not warranted.

III. LOWRY HAD NO "DUE DILIGENCE" REQUIREMENTS TO FOLLOW IN ASCERTAINING LIFE SYSTEMS' ACTUAL ADDRESS PRIOR TO INITIATING SERVICE OF PROCESS.

Life Systems would have this Court read into the statute a due diligence requirement which is not there. Va. Code § 8.01-329(B)(ii) explicitly requires due diligence in searching for a defendant, if that defendant is within the Commonwealth. However, Va. Code § 8.01-329(B)(i), the section relied upon by Lowry, does not require due diligence.

Even if a due diligence requirement were somehow implied, the Florida Uniform Business Report relied upon by Life Systems, dated January 12, 2000, still had James D. Carlburg listed under Officers and Directors as being located at 760 Florida Central Pkwy, Suite 200, Longwood, FL 32750 - the address used by Lowry in initiating service of process. According to Life Systems' own documentation as submitted below, it was not until May 5, 2001 -- over a year after Lowry served process -- that Carlburg's address was changed in the officers and directors column. Thus, reliance upon the Florida Secretary of State's records would still have led Lowry to serve its Motion for Judgment to the same address it actually used.

In this case, Life Systems has wholly failed to produce competent evidence in support of its contentions. Even if its bare allegations were accepted as true, however, Life Systems' own filings reveal that Lowry Chiropractic complied with all jurisdictional and procedural requirements of the law prior to obtaining its default judgment. Simply put, no reason has been established to warrant review of the Richmond Circuit Court's ruling of September 6, 2001, nor of the Virginia Supreme Court's denial of Life Systems' prior appeal.

CONCLUSION

For the foregoing reasons, appellee Lowry Chiropractic Life Centers, Inc. prays that this Court will deny Life Systems, Inc.'s Petition for a Writ of Certiorari.

Respectfully submitted,

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